TABLE OF CONTENTS

	PAGE
Motion	1
Brief	5
Interest of the *Amici*	6
Opinion Below	6
Constitutional Provisions Involved	6
Question to Which This Brief Is Addressed	7
Statement of the Case	7
Summary of Argument	8
Argument	
Article XXXIV of the California Constitution violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution	10
A. The Classification Made by Article XXXIV	10
B. The Shortage of Low-Cost Housing in California	12
C. The Effect of Article XXXIV on Minorities	15
D. The Effect of Article XXXIV on the Poor	16
E. The Ghetto Condition	17
F. The Unreasonableness of the Classification	22
G. The Presumptive Invalidity of Classifications Based on Race or Poverty	24
H. The Limits of Majority Rule	26
Conclusion	28

TABLE OF AUTHORITIES

Cases:	PAGE
Block v. Hirsh, 256 U.S. 135 (1921)	22
Edwards v. California, 314 U. S. 160 (1941)	16
Griffin v. Illinois, 351 U. S. 12 (1956)	16
Hirabayashi v. United States, 320 U. S. 81 (1943)	24
Hunter v. Erickson, 393 U. S. 385 (1969)	27
Korematsu v. United States, 323 U. S. 214 (1944)	24
Lucas v. Forty-Fourth General Assembly, 377 U.S. 713 (1964)	26
McCulloch v. Maryland, 4 Wheat. 316 (1819)	25
McGowan v. State of Maryland, 366 U.S. 420 (1961)	22
Reitman v. Mulkey, 387 U. S. 369 (1967)	27
Shapiro v. Thompson, 394 U. S. 618 (1969)	16
South Carolina State Highway Department v. Barnwell Bros., 303 U. S. 177 (1938)	25
Thomas v. Collins, 323 U. S. 516 (1945)	26
Thornhill v. Alabama, 310 U. S. 88 (1940)	26
United States v. Carolene Products Co., 304 U. S. 144 (1938), footnote 4	24, 25
Yick Wo v. Hopkins, 118 U.S. 356 (1886)	16

PAGE

Other Authorities:

Black, Charles L., Jr., *The Supreme Court 1966 Term, Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 Harv. L. Rev. 69 (1967) 28, 29

Clark, Kenneth B., *Dark Ghetto*, Harper & Row (1965) 20

County of Santa Clara Planning Department, *The Housing Situation: 1969* 14

Department of Industrial Relations Division of Housing, San Francisco, Calif., *Proceedings of the Governor's Conference on Housing* (1960) 12

Edwards, Don, "Housing for Low Income Families in San Jose," p. 18 ..... 11, 12, 13

Galarza, Gallegos and Samosa, *Mexican-Americans in the Southwest* (1969), p. 30 15

Hearings before the U. S. Commission on Civil Rights, San Francisco, Calif., May 1-3, 1967, and Oakland, May 4-6, 1967, U.S. Government Printing Office, Washington, D. C. (1967) 18, 22

Mass. State Advisory Committee to the U. S. Commission on Civil Rights, Report on Two Boston Neighborhood Meetings, *The Voice of the Ghetto*, Boston, 1967, p. 16 18

National Advisory Commission on Civil Disorders, Report, U. S. Government Printing Office, Washington, D. C. (1968) 17, 20

National Committee Against Discrimination in Housing, Unpublished report, submitted to U. S. Department of Housing and Urban Development, October 30, 1969, pp. 11 *et seq.* 21

Proceedings before the Indiana State Advisory Committee to the U. S. Commission on Civil Rights in Gary, Indiana, February 8, 1966, p. 42, U. S. Government Printing Office, Washington, D.C. (1966) 18

U. S. Commission on Civil Rights, *Racial Isolation in the Public Schools* (1967), Vol. 1, p. 110 21

IN THE

Supreme Court of the United States

October Term, 1970

No. 154

RONALD JAMES, *et al.*,

Appellants,

v.

ANITA VALTIERRA, *et al.*,

Appellees.

No. 226

VIRGINIA C. SHAFFER,

Appellant,

v.

ANITA VALTIERRA, *et al.*,

Appellees.

Appeals from the United States District Court for the Northern District of California

MOTION OF AMERICAN JEWISH CONGRESS, AMERICAN JEWISH COMMITTEE AND AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

The undersigned as counsel for the above-named organizations respectfully move this Court for leave to file the accompanying brief *amici curiae.*

The American Jewish Committee was founded in 1907, the American Jewish Congress in 1927. Both organizations are concerned with the preservation of the security and constitutional rights of Jews in America through preservation of the rights of all Americans. Both believe that the welfare of Jews in the United States is inseparably related to the extension of equal opportunity for all, including equal protection of the law for those economically disadvantaged.

The American Civil Liberties Union is a 50-year-old, private non-partisan organization engaged solely in the defense of the Bill of Rights. Its principal interests are freedom of speech and association, due process of law, and the equal protection of the laws.

Discrimination in housing against members of any racial, religious or ethnic group, or against any economically disadvantaged group is, in the view of these organizations, a threat to all groups and to the individual members thereof. Accordingly, the *amici* are deeply concerned with the issues and outcome of these cases.

We believe that this case presents important issues concerning the interpretation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. In challenging the constitutionality of Article XXXIV of the California Constitution which prohibits a state public body from developing, constructing or acquiring a low rent housing project without majority approval of voters at a referendum, the case raises issues concerning the applicability of the Equal Protection Clause to a minority of low income persons.

The accompanying *amici curiae* brief, based upon extensive concern and experience in matters involving dis-

crimination against minorities, is offered in the hope that it will make a significant contribution to the resolution of the issues before the Court.

We have sought the consent of the parties to the filing of a brief *amici curiae*. Counsel for the appellees Valtierra et al. and for the appellee Housing Authority of the City of San Jose granted consent. Counsel for the appellants in each of the appeals withheld consent. Therefore, pursuant to Rule 42 of the Revised Rules of this Court, we move for leave to file our brief *amici curiae,* which is conditionally attached hereto.

October, 1970

Respectfully submitted,

JOSEPH B. ROBISON
15 East 84th Street
New York, New York 10028

SEYMOUR FARBER
EPHRAIM MARGOLIN
593 Market Street
San Francisco, California 94105

Attorneys for American Jewish Congress

EDWIN J. LUKAS
30 Harbor Oak Drive
Tiburon, California 94920

SAMUEL J. RABINOVE
165 East 56th Street
New York, New York 10022

Attorneys for American Jewish Committee

MELVIN L. WULF
JOEL M. GORA
156 Fifth Avenue
New York, New York 10010

PAUL HALVONIK
503 Market Street
San Francisco, California 94105

Attorneys for American Civil Liberties Union

IN THE

Supreme Court of the United States

October Term, 1970

No. 154

RONALD JAMES, *et al.*,

Appellants,

v.

ANITA VALTIERRA, *et al.*,

Appellees.

No. 226

VIRGINIA C. SHAFFER,

Appellant,

v.

ANITA VALTIERRA, *et al.*,

Appellees.

Appeals from the United States District Court for the Northern District of California

---

BRIEF OF AMERICAN JEWISH CONGRESS, AMERICAN JEWISH COMMITTEE AND AMERICAN CIVIL LIBERTIES UNION, *AMICI CURIAE*

This brief is submitted by the undersigned *amici curiae* conditionally upon the granting of the Motion for Leave to File to which it is attached.

Interest of the *Amici*

The interest of the *amici* is set forth in the attached Motion for Leave to File.

Opinion Below

The opinion of the three-judge District Court (App. 168-177) is reported at 313 F. Supp. 1 (N.D. Cal. 1970).

Constitutional Provisions Involved

1. Amendment XIV of the Constitution of the United States provides in pertinent part:

> No State shall * * * deny to any person within its jurisdiction the equal protection of the laws.

2. Article XXXIV of the California Constitution provides:

> No low rent housing project shall hereafter be developed, constructed, or acquired in any manner by any state public body until a majority of the qualified electors of the city, town or country, as the case may be, in which it is proposed to develop, construct, or acquire the same, voting upon such issue, approve such project by voting in favor thereof at an election to be held for that purpose, or at any general or special election.
>
> For the purpose of this article the term "low rent housing project" shall mean any development composed of urban or rural dwellings, apartments or other living accommodations for persons of low income, financed in whole or in part by the Federal Government or a state public body or to which the Federal

Government or a state public body extends assistance by supplying all or part of the labor, by guaranteeing the payment of liens, or otherwise. For the purposes of this article only there shall be excluded from the term "low rent housing project" any such project where there shall be in existence on the effective date hereof, a contract for financial assistance between any state public body and the Federal Government in respect to such project.

For the purposes of this article only "persons of low income" shall mean persons or families who lack the amount of income which is necessary (as determined by the state public body developing, constructing, or acquiring the housing project) to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding.

Question to Which This Brief Is Addressed

Does Article XXXIV of the California Constitution violate the Equal Protection Clause of the Fourteenth Amendment?

Statement of the Case

Appellees are all "persons of low income" residing in Santa Clara and San Mateo Counties in California. They are predominantly black and Mexican-American. It is undisputed that they now reside in overcrowded, run-down, rat-infested, roach-infested, substandard, unsafe and unsanitary housing. They are required to pay rents that are exorbitant in light of their income and, therefore, are compelled to deprive themselves of other basic needs, such as clothing and adequate food. They are eligible for public housing and, together with more than 2,600 families similarly situated, have been placed on the waiting lists for

low-rent housing of their local authorities. However, they have not been placed in low-rent units because no such units are available. And, unless and until the decision below is affirmed by this Court, the contested requirement of a referendum under Article XXXIV of the California Constitution will stand as a formidable barrier to any such units becoming available. For, despite the clear and compelling need for public housing in Santa Clara and San Mateo Counties, responsible housing authority officials do not now even propose additional units because of the prohibitive costs of referenda and the fear of defeat in the light of experience.

The suit was instituted by appellees Valtierra et al. against the City Council of San Jose and the San Jose Housing Authority. A three-judge District Court granted summary judgment to the plaintiffs and these appeals were taken from that judgment.

Summary of Argument

Article XXXIV of the California Constitution violates the Equal Protection Clause of the Fourteenth Amendment.

A. Under Article XXXIV, low-cost housing projects may not be built unless they are approved by a popular referendum in the affected area. This requirement is not imposed on any other type of public project. Its effect is to reduce the amount of government supported housing that is available to those who need it most.

B. There is an acute shortage of low-rent housing for low-income families in California. This condition has existed for at least a decade.

C. The specifically identifiable victims of the discriminatory provisions of Article XXXIV are the poor. In our society this means primarily Negroes, Mexican-Americans and other minorities. Article XXXIV is therefore vulnerable under the equal protection concept, even though it is not based explicitly on race.

D. Aside from the issue of race, Article XXXIV violates the Equal Protection Clause because it imposes special burdens on the poor.

E. The damage done by the classification made by Article XXXIV, either on the basis of race or on the basis of poverty, is more than sufficient to form the basis of a claim of constitutional injury. There is ample evidence of the destructive effect of ghetto housing on its victims.

F. The classification made by Article XXXIV is unreasonable. The attempted justification thereof by appellants is feeble. Indeed, it is clear that Article XXXIV is specifically designed to enable the residents of an area to veto benefits for a specified group, defined by race, national origin or poverty.

G. Any classification based on race or poverty is presumptively invalid. The poor are a discrete, insular minority who face substantial handicaps in using the political process to redress their grievances.

H. The position we take is not inconsistent with the principle of majority rule. Constitutional limitations such as the Equal Protection Clause are specifically designed to protect minorities against abuse through exercise of the power of majorities.

ARGUMENT

Article XXXIV of the California Constitution violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

A. The Classification Made by Article XXXIV

Article XXXIV of the California Constitution subjects low-cost housing, and low-cost housing alone, to a requirement of approval by popular referendum. Its terms apply only to "living accommodations for persons of low income" financed by the Federal or state government. The class affected is carefully defined to mean those whose income is so low that they need such assistance in order to "live in decent, safe and sanitary dwellings, without overcrowding."

One might have expected that a state that recognizes, in its Constitution, that some of its inhabitants are so poor that they cannot obtain decent housing without governmental assistance would *facilitate* efforts to meet that need, rather than obstruct it. Instead, we find the referendum requirement imposed on low-cost housing—but not on any other governmental benefit. California law imposes no such burden on the approval of any other housing or other project enjoying Federal or state assistance. Massive urban renewal programs leveling whole city blocks, model cities' proposals designed to overhaul whole areas, huge medical centers and university complexes—all these can be launched without a referendum, although the impact on the locality, in terms of added municipal services, increased tax burdens and higher population (or daytime) density may be even greater than for a particular low-rent housing development.

Not even the fact that urban renewal and other projects may disrupt the lives of hundreds of families is viewed as a reason for imposing the referendum hurdle on them. Thus, Congressman Don Edwards, in whose Congressional District the appellees reside, has pointed out that:

> San Jose's two urban renewal projects are destroying 681 units of housing for low and very low income families.[1]

These families, of course, are given no opportunity to vote on whether the project that affects them so drastically shall be allowed to proceed.

The simple, obvious effect of Article XXXIV is to reduce the amount of government-supported housing that is available to those who need it most. This is not a matter of speculation. The effect of Article XXXIV on low-income housing has been disastrous. New housing units are not even proposed because of the cost of an election and the fear that the proposal will be defeated.[2] As a result, California lags behind other states in the construction of low-rent units. With 8% of the nation's poor, it has only 4% of the low-income housing units (App. 38). It has constructed 23.4 low-income units per 1,000 low-income family groups, compared with 73.1 per 1,000 in Illinois, 66.7 in New York, 62.6 in Massachusetts, 60.1 in Pennsylvania, 43.2 in Ohio and 36.5 in Texas (App. 38).

1. Edwards, Don, "Housing for Low Income Families in San Jose," a report summarizing a study of low-rent housing in Santa Clara County in December 1969; available from Congressman Edwards' office, p. 18.

2. See affidavits of the Executive Directors for the Housing Authorities of Sacramento, Santa Clara and San Mateo Counties (App. 23-24, 31-33, 122-24).

There is no evidence that a similar discrepancy exists between California and other states with respect to programs not affected by Article XXXIV. In fact, as Congressman Edwards has pointed out:

> San Jose has a remarkably high record of success in all of its requests for federal assistance in areas other than housing.[3]

B. The Shortage of Low-Cost Housing in California

This case arises at a time when the inadequacy of the low-rent housing for low-income families is of critical dimensions in California. When the *Proceedings of the Governor's Conference on Housing,* held in Los Angeles, June 13-15, 1960, were published, the Group Session on Planning reported among other things:[4]

> 1. Federally aided low-rent dwellings are insufficient for present housing needs. Only 25,500 units have been built in California in almost 25 years.
>
> 2. Although state enforcement of agricultural workers' housing standards has been good, this has led to some intercounty movement of structures and the development of "shacktown" settlements in urban areas.
>
> 3. Legislative obstacles to public housing in California exist in the referendum requirement of housing authorities and the ban on use of urban renewal project sites for public housing.[5]

3. Report, *supra,* note 1, p. 19.

4. Department of Industrial Relations Division of Housing, San Francisco, California (1960), p. 37.

5. While the emphasis in this brief has been on urban slum ghettos, it should be understood that the need for decent housing for the rural poor, which in California means largely Mexican-Americans, is equally critical. And Article XXXIV by its terms applies to "urban or rural dwellings."

Although more than nine years elapsed between that conference and the initiation of this litigation, the pressing problems identified by that conference, i.e., the housing shortage for low-income families in California, appear to be at least as acute today as they were at that time. This seems especially true of the County of Santa Clara, the county in which the appellees reside.

Its Congressional representative, Don Edwards, commissioned a study of low-rent housing in that county, examining its status during the month of December, 1969.[6] In summarizing the findings of that study, he concluded (emphasis supplied):

> While the 1949 Housing Act authorized 800,000 units of public housing (for families with incomes of $400 or less per month), to be built in six years in the 50 states, only two-thirds of that six-year total has been built in 20 years. (*None has been built in San Jose or Santa Clara County.*)
>
> Only 30,000 public housing units a year are being built in the United States. Of these, more than half are small apartments for the elderly. Virtually no housing has been built in the ghettos of the United States for poor families—particularly poor Black and Mexican-American families—who need it most. (*None has been built in Santa Clara County or San Jose.*) (pp. 17-18)
>
> • • •
>
> San Jose's remarkable record in receiving grants of federal assistance in areas other than housing is threatened by the city's poor record in low income housing (p. 20).
>
> • • •
>
> The first reason for San Jose being behind in housing for low income and very low income families is that it has failed to take advantage of available federal

6. See Note 1, *supra*.

programs, especially public housing, designed for the poor and very low income families. California's peculiar law requiring a referendum for every project is the key factor. 1,000 units dispersed throughout the city could be under construction today had the voters approved the referendum in November, 1968 (pp. 20-21).

An even more comprehensive study of Santa Clara housing was recently completed by its Planning Department.[7] Unsurprisingly, it revealed:

> The minority groups of the County are concentrated principally in the areas of low income, and are relatively scarce in the high income districts. The largest minority group in Santa Clara County are the Mexican-Americans, who accounted for 9.6 per cent of the population in 1966. Overall, the proportion of minorities in the County has remained at about 15 per cent of the total population.
>
> For the poor and the minorities, housing in the County is limited in quantity and low in quality. While only five per cent of the housing units occupied by non-Mexican-American whites was unsound in 1960, 23 per cent of the units occupied by Mexican-Americans was unsound. Overcrowding was found in 30 per cent of Mexican-American households in 1960, compared to only 6 per cent of non-Mexican-American white households.[8]
>
> * * * The provision of decent, safe, sanitary housing for such households requires public subsidy. Units needed by housing authorities would be in addition to the supply of units otherwise available. It is most probable that present waiting lists of approximately 1,000 households substantially underestimate true needs of housing authorities.[9]

7. County of Santa Clara Planning Department. *The Housing Situation: 1969.*

8. *Id.* at p. ii.

9. *Id.* at p. 29.

But no steps have since been taken to relieve the urgent need for low-cost housing despite the availability of federal financial assistance.

C. The Effect of Article XXXIV on Minorities

The discriminatory effect of Article XXXIV has specific, identifiable victims—those who have insufficient income to get decent uncrowded housing without assistance. In our society, and certainly in California, that means primarily Negroes, Mexican-Americans and other minorities.[10]

---

10. This point was made convincingly with respect to Mexican-Americans in Galarza, Gallegos and Samosa, *Mexican-Americans in the Southwest* (1969), p. 30.

> Poverty and minority are synonymous for a large segment of the Mexican-American population. According to the 1960 census there were 243,000 families in the Southwest who were living in poverty commonly described as stark. In these families there were 1,100,000 individuals of whom 530,000 were minors under 18 years of age.
>
> The Mexican-American registers a far greater percentage of the poor than of the total population. * * * In California, where one out of ten residents was of Mexican ancestry, two out of ten of all poor families belonged to this ethnic group.
>
> * * *
>
> Housing problems are particularly severe for persons of low income and for minorities. Low income households compete for a limited number of frequently substandard units composed almost exclusively of used single family and rental housing. The housing problems of non-white and Mexican-Americans result from a combination of both poverty and discrimination, and they have housing choices significantly more limited than those open to white non-Mexican-Americans.
>
> * * *
>
> Mexican-Americans are the largest minority group in Santa Clara County, constituting 9.6 per cent of the 1966 population. From 1960 to 1966 the Mexican-American population increased by at least 17 per cent, compared to the 45 per cent increase in white non-Mexican-Americans in the same period. Black and other non-white populations increased from 3.4 per cent to 4.2 per cent of the population from 1960 to 1966. Since 1960, minorities have remained at about 15 per cent of the County population.

Thus, there can be little doubt about the practical impact of Article XXXIV. It falls largely on the racially disadvantaged. It means that proposals for federally financed housing designed to alleviate the critical housing needs of Blacks and Mexican-Americans must first be submitted to a referendum.

The fact that Article XXXIV is not expressly based on race and does not specifically single out minority groups is not decisive. It is appropriate to ask a simple, blunt question: Whom do we think of when the phrase "low-cost housing for low-income groups" is used? If Article XXXIV had been written expressly to apply only to Blacks and Mexican-Americans, there would be no doubt as to its invalidity. Should the result be any different if the sponsors of Article XXXIV avoided the direct racial classification and yet achieved the same result? We submit that this Court made it clear long ago that, if a law's impact is on minorities, resulting in a special burden, it is constitutionally impermissible. *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886).

D. The Effect of Article XXXIV on the Poor

Even if we assume, however, that no discrimination on the basis of race or national origin can be shown, Article XXXIV is vulnerable because it is an untenable discrimination against the poor. Again, this Court has made it clear that a state may not impose special burdens on the poor just because they are poor. *Edwards* v. *California*, 314 U. S. 160 (1941); *Shapiro* v. *Thompson*, 394 U. S. 618 (1969); *Griffin* v. *Illinois*, 351 U. S. 12 (1956). By requiring the poor in California to obtain public approval for

proposals to obtain federal assistance for low-cost housing while not imposing any similar requirement with respect to any other groups' proposal seeking federal assistance (although the impact on the community of other proposals may be even more substantial), California has impermissibly disfavored the poor.

E. The Ghetto Condition

Viewing the classification made by Article XXXIV as based on either race or poverty, the damage it does is more than sufficient to form the basis of a claim of constitutional injury.

It is difficult to characterize adequately the conditions that prevail in urban ghettos. Most ghetto residents suffer inadequate housing, inferior education, unemployment, underemployment, discriminatory consumer and credit practices, poor transportation, sanitation, recreation and other essential municipal services, and a much higher crime rate than other sections of the city. They also are required to tolerate much poorer health services, and much higher sickness and mortality rates.[11]

Slum ghetto inhabitants have described their own plight:

> When they have to get out on the street at 14 or 15 they consider themselves to be a man and are going to take on some responsibility because he is the only man in the house and he has little brothers and sisters going hungry, half starving and trying to get the rent in. It is a bare house, like it is a cold feeling even to be there

11. Report of the National Advisory Commission on Civil Disorders, U. S. Government Printing Office, Washington, D. C. (1968).

> and you have to go out on the street and become the subject of the same thing out there. There has to be a breaking point.[12]

A Negro woman in Gary, Indiana, expressed her feelings about her slum ghetto life in this manner:

> I mean outside of this district time marches on * * * They build better and they have better but you come down here and you see the same thing year after year after year. People struggling, people wanting, people needing, and nobody to give anyone help.[13]

A housewife who lives in the South End of Boston commented graphically on the housing situation in her neighborhood:

> A person rents a broken-down room for $21 to $24 a week that is rat-infested and has cockroaches running all over the place. There are holes in the ceiling where the plaster has fallen down and the people have to share a bathroom. The so-called furnished apartments usually contain a few chairs, a table and an old rusty bed * * * Frequently, social workers tell families to move out of these homes where the rents are too high, but they never find them decent homes where rents are lower.[14]

---

12. Hearing before the U. S. Commission on Civil Rights, San Francisco, California, May 1-3, 1967, and Oakland, California, May 4-6, 1967, p. 284 (U. S. Government Printing Office, Washington, D. C. (1967)).

13. Proceedings before the Indiana State Advisory Committee to the U. S. Commission on Civil Rights in Gary, Indiana, February 8, 1966, p. 42 (U.S. Government Printing Office, Washington, D. C. (1966)).

14. *The Voice of the Ghetto.* Report on Two Boston Neighborhood Meetings, p. 16 (Mass. State Advisory Committee to the U. S. Commission on Civil Rights, Boston, Massachusetts (1967)).

Article XXXIV closes off an escape route from these conditions, quite possibly the only escape route. Low-cost public housing is the only plan for housing the poor that has received any significant support.

The impact upon the poor of their imprisonment in substandard slum ghettos is mirrored in the toxic side effects they constantly confront as the inevitable by-products of their confining environment. Socially, economically, physically, and psychologically, the traumatic effect of that imprisonment describes a wide arc.

The ability of the low-income, minority family member to participate influentially in the political affairs of the community is virtually nil. This, in turn, produces a sense of outrage and a surge of militancy.

> Many Negroes have come to believe that they are being exploited politically and economically by the white "power structure." Negroes, like people in poverty everywhere, in fact lack the channels of communication, influence, and appeal that traditionally have been available to ethnic minorities within the city and which enabled them—unburdened by color—to scale the walls of the white ghettos in an earlier era. The frustrations of powerlessness have led some to the conviction that there is no effective alternative to violence as a means of expression and redress, as a way of "moving the system." More generally, the result is alienation and hostility toward the institution of law and government and the white society which controls them. This is reflected in the reach toward racial consciousness and solidarity reflected in the slogan "Black Power."
>
> These facts have combined to inspire a new mood among Negroes, particularly among the young. Self-

> esteem and enhanced racial pride are replacing apathy and submission to "the system." Moreover, Negro youth, who make up over half of the ghetto population, share the growing sense of alienation felt by many white youth in our country. Thus, their role in recent civil disorders reflects not only a shared sense of deprivation and victimization by white society but also the rising incidence of disruptive conduct by a segment of American youth throughout the society.[15]

Dr. Kenneth B. Clark has described the social and psychological impact of rotting housing:

> Housing is no abstract social and political problem, but an extension of a man's personality. If the Negro has to identify with a rat-infested tenement, his sense of personal inadequacy and inferiority, already aggravated by job discrimination and other forms of humiliation, is reinforced by the physical reality around him. If his home is clean and decent and even in some way beautiful, his sense of self is stronger. A house is a concrete symbol of what the person is worth.[16]

The experience of the adult in the slum ghetto is, in some predictably melancholy fashion, duplicated in the life of the child in a slum-ghetto isolated school.

> Racial isolation in the schools also fosters attitudes and behavior that perpetuate isolation in other important areas of American life. Negro adults who attended racially isolated schools are more likely to have developed attitudes that alienate them from whites. White adults with similarly isolated backgrounds tend

15. Report of the National Advisory Commission on Civil Disorders. U. S. Government Printing Office (March 1, 1968), p. 92.

16. Clark, Kenneth B., *Dark Ghetto*. Harper & Row (1965), p. 11.

to resist desegregation in many areas—housing, jobs and schools.

At the same time, attendance at racially isolated schools tends to reinforce the very attitudes that assign inferior status to Negroes. White adults who attended schools in racial isolation are more apt than other whites to regard Negro institutions as inferior and to resist measures designed to overcome discrimination against Negroes. Negro adults who attended such schools are likely to have lower self-esteem and to accept the assignment of inferior status.[17]

Restricted housing also limits employment opportunities. A study recently conducted by the National Committee Against Discrimination in Housing of the nine counties comprising the San Francisco Bay Area (of which San Mateo and Santa Clara were two), describes in detail the inter-relationship between employment trends and housing needs, especially in terms of potential employment opportunities available to the minority (racial and ethnic) labor force in light of the location of their households.[18]

The situation in Oakland, Alameda County, California, is illustrative. In 1967, Oakland had a Negro population of 120,000 out of a total of 385,000. The over-all Negro unemployment rate in Oakland during 1967 was 23 percent; for Negro teenagers it was 41 percent. Yet in the suburban areas of Alameda County, where few Negroes live, there were approximately 185,000 jobs at all levels of skill, of which only 3,700 were held by Negroes. Some jobs are

17. Report of the United States Commission on Civil Rights. *Racial Isolation in the Public Schools* (1967), Vol. 1, p. 110.

18. Report yet unpublished, submitted to U. S. Department of Housing and Urban Development on October 30, 1969, pp. 11-12, 14, 24.

always open, but public transportation from Oakland to the outlying areas of Alameda County is limited and costly, and relatively few Negroes in the Oakland slums are able to afford cars.[19]

F. The Unreasonableness of the Classification

This Court held in *McGowan* v. *State of Maryland*, 366 U.S. 420 (1961), a case involving "only economic injury" (366 U.S. at 429), that the Equal Protection Clause "permits the states a wide scope of discretion in enacting laws which affect some groups of citizens differently than others" (at 425). Manifestly, however, this Court did not hold either in *McGowan* or in the cases therein cited that arbitrary classifications are permissible. It is still necessary for the courts to effectuate the mandate of the Equal Protection Clause.

What is involved here is not a mere "economic injury" due to restrictions on the operation of a store but access to "a necessary of life." *Block* v. *Hirsh*, 256 U.S. 135, 156 (1921). Article XXXIV has the effect of denying, to a specific class, housing to which they are otherwise eligible. The distinction thus made bears no reasonable relationship to any permissible government objective—and certainly not to the objective of assuring decent, uncrowded housing to California citizens. The efforts of appellants to find such a justification are at best feeble.

The "fiscal" and "non-fiscal" considerations which Appellants Shaffer (Brief, pp. 33-37) and James (Brief, pp.

19. Hearing before the U. S. Commission on Civil Rights, San Francisco, California, May 1-3, 1967, and Oakland, California, May 4-6, 1967, pp. 16 and 558 (U. S. Government Printing Office, Washington, D. C. (1967)).

14-15) offer to justify special treatment for federally financed low-cost housing are on their face equally applicable to other forms of proposals requiring Federal financial assistance. Surely, a large urban renewal project, or a new medical center, or a new university create fiscal problems of added police and fire protection, streets, sewers, drains and lighting no less in some instances and more in perhaps others than a particular low-rent housing proposal. Surely, problems relating to city planning, redevelopment and zoning are equally applicable to a host of other projects requiring Federal financial assistance, and are not in any way peculiar to low-cost housing proposals.

It is almost impossible to avoid the conclusion that Article XXXIV has only one purpose; it was designed to enable persons residing in any particular area to veto benefits for a specified group defined by race, national origin or poverty.

It must be remembered that the restraints that are imposed by constitutional principle on state action—legislative, judicial and executive—are inherently inoperative in the case of referenda. No standards can be set to which the electorate must adhere; for example, in deciding which low-rent projects to approve and which to reject. Its decisions may be entirely arbitrary. Most important, no limitation can be imposed to bar action based quite consciously and deliberately on race, poverty or other considerations that may not constitutionally affect state action. There is no way to determine the intent of the electorate or to police its actions. Thus, Article XXXIV is effectively designed to facilitate restriction of housing that might benefit minority families.

G. The Presumptive Invalidity of Classifications Based on Race or Poverty

In any case, we believe, the usual presumption that classifications made by state law are valid is not applicable here. If we are right in our argument above that the distinction drawn by Article XXXIV is based on race and national origin, it is, by that fact alone, a violation of the Equal Protection Clause. As this Court said in *Hirabayashi* v. *United States*, 320 U.S. 81, 100 (1943):

> Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.

Subsequently, in *Korematsu* v. *United States*, 323 U.S. 214, 216 (1944), this Court said that, "Pressing public necessity may sometimes justify the existence of such distinctions; racial antagonism never can." Here, there is no pretense that Article XXXIV reflects pressing necessity. On the contrary, there is ample reason to conclude that it is founded in, and facilitates the operation of, "racial antagonism."

If one ignores the racial aspect of Article XXXIV, it is still inescapably true that the distinction it draws is, by definition, based on poverty. We submit that such a distinction also is presumptively invalid.

When this Court suggested in its historic footnote 4 in *United States* v. *Carolene Products Co.*, 304 U.S. 144, 151 (1938) that there may be a "narrow scope" for the presumption of constitutionality when basic rights are involved, it said that "prejudice against discrete and insular

minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." While the "minorities" principally contemplated in *Carolene Products* may well have been racial and religious groups, the decisions cited in support of the propositions were not limited to these groups. (The Court cited, *inter alia, McCulloch* v. *Maryland,* 4 Wheat. 316 (1819), and *South Carolina State Highway Department* v. *Barnwell Bros.,* 303 U.S. 177 (1938), neither of which involved a racial or religious minority.)

The group here affected is a discrete and insular minority against whom sufficient prejudice exists to curtail the operation of the ordinary political processes for the protection of minorities. The poor are the group in the population least able to gain access to the power structure or to raise the funds needed to wage an effective public campaign—either to oppose such measures as Article XXXIV in the first place or to obtain approval in a referendum of a project from which they would benefit.

It follows that the rights asserted by the appellees here are entitled to that more exacting judicial protection contemplated in *Carolene.* Ordinarily, if a situation exists requiring action by a state, it is for the state to determine the appropriateness of a proposed remedy, and the courts may not interfere unless the state's act is patently unreasonable. But for a measure abridging the rights of a "discrete and insular minority," a more rigorous test is imposed. "The rational connection between the remedy provided and the evil to be curbed, which in other contexts

might support legislation against attack on due process grounds, will not suffice." *Thomas* v. *Collins,* 323 U.S. 516, 530 (1945). "Mere legislative preference for one rather than another means for combatting substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions." *Thornhill* v. *Alabama,* 310 U.S. 88, 95-96 (1940).

Article XXXIV, we submit, fails to meet the test laid down in these cases.

H. The Limits of Majority Rule

The cases above speak primarily in terms of "legislative" action. Yet, it plainly makes no difference, in applying constitutional restraints on governmental action, that a measure takes the form of a constitutional provision approved by a referendum. *Lucas* v. *Forty-Fourth General Assembly,* 377 U.S. 713, 736 (1964).

Neither is it significant that the mechanism invoked by Article XXXIV also uses the electoral process. The action of the electorate in an Article XXXIV referendum is "state action," even in the most limited sense of that term. It exercises the full panoply of state power, under a grant of authority from the state. And it makes a decision as to the use of public resources which the Legislative or Executive Branches would otherwise make. In exercising such power, it is subject to the limitations of the Equal Protection Clause.

We reject the suggestion of Appellant Shaffer (Brief, pp. 60-61) that opposition to the referendum process created by Article XXXIV is a "reversal of history" or inherently anti-democratic. The constitutional guarantee of equal protection, like most constitutional guarantees, rests on the assumption that the majority is capable of abusing the minority and that such abuses must be prevented by a law higher than majorities—in legislatures or referenda.

Justice Douglas made this clear in concurring in this Court's decision in *Reitman* v. *Mulkey*, 387 U.S. 369 (1967) invalidating an amendment to the California Constitution that had been approved by referendum. He said (at 387):

> And to those who say that Proposition 14 represents the will of the people of California, one can only reply:
>
> "Wherever the real power in Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents. This is a truth of great importance, but not yet sufficiently attended to * * *" 5 Writings of James Madison 272 (Hunt ed. 1904).

Similarly, Justice White emphasized in *Hunter* v. *Erickson*, 393 U.S. 385, 392 (1969):

> The sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed.

Conclusion

We urge this Court to give the Equal Protection Clause an interpretation "adequate to the realities of law's involvement with life,"[20] an interpretation that gives weight to the fact that today, at the beginning of the last third of the Twentieth Century, millions of Americans live in substandard housing. We urge rejection of the idea that the term, "equal protection," defines what Professor Black has called "a kind of game, in which the object is for the state to see what it can get away with."[21] Professor Black has put the issue in this way:

> When we think of the next hundred years, we have to ask ourselves the question that rises to the solemnity of that lapse of time. Law will envelop and support and shape our society during that century. If at the end of that century, it is still a thing to be told in every traveler's tale that American Negroes are in poverty and misery, if they are still in fact discernibly disadvantaged because of their race, and if during that century the states have maintained legal regimes which did not put forth all reasonably possible affirmative effort to relieve this suffering and practical subordination, are our descendants going to be able to say that the century has been marked by "equal protection of the laws" for Negroes? A hollow and formal "equality," perhaps, if carefully enough defined in categories thereunto devised by the discriminators. But "equal protection"? Will they be able to tell themselves that the state has had no "significant" part in inequalities which have thriven under the regime it maintains and

20. Black, Charles L., Jr., *The Supreme Court 1966 Term, Foreword: "State Action," Equal Protection, and California's Proposition 14.* 81 Harv. L. Rev. 69, 99 (1967).

21. *Ibid.*

guards, and which have enjoyed the immunities mathematically reciprocal to its abstentions? Grounds so "narrow and artificial" may do for the first century of "equal protection." Will they do for the second?[22]

For the reasons stated above, we respectfully submit that the decision below should be affirmed.

October, 1970

Respectfully submitted,

JOSEPH B. ROBISON
15 East 84th Street
New York, New York 10028

SEYMOUR FARBER
EPHRAIM MARGOLIN
593 Market Street
San Francisco, California 94105

Attorneys for American Jewish Congress

EDWIN J. LUKAS
30 Harbor Oak Drive
Tiburon, California 94920

SAMUEL J. RABINOVE
165 East 56th Street
New York, New York 10022

Attorneys for American Jewish Committee

MELVIN L. WULF
JOEL M. GORA
156 Fifth Avenue
New York, New York 10010

PAUL HALVONIK
503 Market Street
San Francisco, California 94105

Attorneys for American Civil Liberties Union

22. *Id.* at p. 98.